(8)

Supreme Court, U.S.
FILED
FEB 21 2003

No. 02-196

In the Supreme Court of the United States

NATIONAL PARK HOSPITALITY ASSOCIATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

KENNETH S. GELLER
Counsel of Record
RICHARD B. KATSKEE
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

28 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE NPS'S POSITION IGNORES THE TEXT AND HISTORY OF THE CONTRACT DISPUTES ACT OF 1978. 2

II. THERE IS NO SUPPORT FOR THE TWO IMPLIED LIMITATIONS ON CDA COVERAGE PROFFERED BY THE NPS. 5

A CDA Coverage Is Not Limited To Contracts Involving The Expenditure Of Government Funds. 5

B CDA Coverage Does Not Depend On Who May Be Said To "Benefit" From A Government Contract. 11

III. NPS CONCESSIONS CONTRACTS PROCURE A DIRECT BENEFIT FOR THE GOVERNMENT. 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Barnhart v. *Sigmon Coal Co.*, 534 U.S. 438 (2002) 7, 12, 13

Blanco-Mora Enterprises, Inc., HUDBCA No. 94-G-136-C5, 94-3 BCA ¶ 26,974, 1994 WL 248163 (June 10, 1994) 17

Bragdon v. *Abbott*, 524 U.S. 624 (1998) 2

Cleveland v. *United States*, 531 U.S. 12 (2000) 9

Delta S.S. Lines, Inc. v. *United States*, 3 Cl. Ct. 559 (1983) 16, 17

Forsham v. *Harris*, 445 U.S. 169 (1980) 13

G.E. Boggs & Assocs., Inc. v. *Roskens*, 969 F.2d 1023 (Fed. Cir. 1992) 9

Henke v. *U.S. Dep't of Commerce*, 83 F.3d 1445 (D.C. Cir. 1996) 15

Hernandez, ASBCA No. 53,011, 01-1 BCA ¶ 31,220, 2000 WL 1844742 (Dec. 12, 2000) 13

Hohn v. *United States*, 524 U.S. 236 (1998) 7, 12, 13

Institut Pasteur v. *United States*, 814 F.2d 624 (Fed. Cir. 1987) 9

Janowsky v. *United States*, No. 92-5004, 1993 WL 36863 (Fed. Cir. Feb. 17, 1993) 17

New Era Construction v. *United States*, 890 F.2d 1152 (Fed. Cir. 1989) 17

R & R Enters., IBCA No. 2417, 1989 WL 27790 (Mar. 24, 1989) 14

TABLE OF AUTHORITIES – continued

Page(s)

Russello v. *United States*, 464 U.S. 16 (1983) 7

Total Med. Mgmt., Inc. v. *United States*, 104 F.3d 1314 (Fed. Cir. 1997) 12, 15, 17

Trauma Serv. Group v. *United States*, 104 F.3d 1321 (Fed. Cir. 1997) 15

TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 8

United States v. *Chatman*, 986 F.2d 1446 (D.C. Cir. 1993) 4

United States v. *Poff*, 926 F.2d 588 (7th Cir. 1991) (en banc) 4

United States v. *Providence Journal Co.*, 485 U.S. 693 (1988) 3

United States v. *Salerno*, 481 U.S. 739 (1987) 20

United States v. *Weddle*, 30 F.3d 532 (4th Cir. 1994) 4

Universal Interpretive Shuttle Corp. v. *Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186 (1968) 16

Winstar Corp. v. *United States*, 21 Cl. Ct. 112 (1990) 17, 18

YRT Servs. Corp. v. *United States*, 28 Fed. Cl. 366 (1993) 19

Yosemite Park & Curry Co. v. *United States*, 582 F.2d 552 (Ct. Cl. 1978) 5, 12

TABLE OF AUTHORITIES – continued

Page(s)

STATUTES, RULES AND REGULATIONS

The Long-Term Care Security Act of 2000 ("Long Term Care Act"), Pub. L. No. 106-265, 114 Stat. 762 (codified at 5 U.S.C. §§ 9001-9009) 15

16 U.S.C. § 1 ..... 16, 20

16 U.S.C. § 3 9

16 U.S.C. § 17b 16

National Park Service Concessions Policy Act of 1965 ("1965 Act"), Pub. L. No. 89-249, 79 Stat. 969 (1965) 9, 16

16 U.S.C. § 20 16

National Parks Omnibus Management Act of 1998 ("1998 Act"), Pub. L. No. 105-391, 112 Stat. 3497 (codified with certain exceptions at 16 U.S.C. §§ 5951-5966) ..... *passim*

16 U.S.C. § 5951 ..... 16, 18, 20

16 U.S.C. § 5952 ..... 9, 16

28 U.S.C. § 1346 3

28 U.S.C. § 1491 3

Federal Grant and Cooperative Agreement Act of 1977 ("FGCAA"), Pub. L. No. 95-224, 92 Stat. 3 ..... *passim*

§ 4, 31 U.S.C. § 6303 ..... 9, 13, 14, 16, 18

§ 5, 31 U.S.C. § 6304 14

§ 6, 31 U.S.C. § 6305 14

41 U.S.C. § 423 ..... 10, 12

TABLE OF AUTHORITIES – continued

Page(s)

The Contract Disputes Act of 1978 ("CDA"), Pub. L. No. 95-563, 92 Stat. 2383 (codified at 41 U.S.C. §§ 601-613) ..... *passim*

41 U.S.C. § 602 ..... 1, 3, 4, 6

41 U.S.C. § 612 11

Armed Services Procurement Act of 1947 ("ASPA"), Pub. L. No. 80-413, 62 Stat. 20 ..... 6, 7, 12

Federal Property and Administrative Services Act of 1949 ("FPASA"), Pub. L. No. 81-152, 63 Stat. 372 ..... 7, 12

Office of Federal Procurement Policy Act ("OFPPA"), Pub. L. No. 93-400, 88 Stat. 796 ..... 1, 6, 7, 8, 10

§ 6 ..... 7, 8

Office of the Federal Procurement Policy Act Amendments of 1979, Pub. L. No. 96-83, § 4, 93 Stat. 649 8

Pub. L. No. 91-129, § 1, 83 Stat. 269 12

10 C.F.R. § 851.102 (1948) 6, 7, 12

41 C.F.R. § 1-1.208 (1960) 7, 12

41 C.F.R. § 1-1.209 (1960) 7

Federal Acquisition Regulation ("FAR") ..... *passim*

48 C.F.R. § 2.101 ..... 9, 10

48 C.F.R. pt. 33 9

TABLE OF AUTHORITIES – continued

Page(s)

Implementation of Federal Grant and Cooperative Agreement Act of 1977 (Pub. L. 95-224); Final OMB Guidance, 43 Fed. Reg. 36,860, 36,862 (Aug. 18, 1978) 14

Final Rule, 57 Fed. Reg. 40,496 (1992) 5

Standard Concessions Contract, 65 Fed. Reg. 26,052 (May 4, 2000) 20

Simplified Concession Contracts, 65 Fed. Reg. 44,894 (July 19, 2000) 20

Final Rule, 66 Fed. Reg. 2117 (Jan. 10, 2001) 9

MISCELLANEOUS

Dep't of Interior, 505 Departmental Manual 2.3(B), available at http://elips.doi.gov/elips/ release/ 3080.htm 15

Executive Agency Nonappropriated Fund Procurement Study Group, *Study of Procurement Payable from Nonappropriated Funds* (1976) 8

RALPH C. NASH, JR. *ET AL.*, THE GOVERNMENT CONTRACTS REFERENCE BOOK (2d ed. 1998) 9, 10, 12

REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT (1972) 13, 14

S. REP. NO. 80-571, 1947 U.S.C.C.A.N. 1048 12

S. REP. NO. 95-449, 1978 U.S.C.C.A.N. 11 13

S. REP. NO. 95-1118, 1978 U.S.C.C.A.N. 5235 ..... 2, 4, 11

REPLY BRIEF FOR THE PETITIONER

The most remarkable aspect of the National Park Service's brief is how little attention it pays to the actual *text* of the Contract Disputes Act or to the reasons for the statute's enactment. Instead, the agency focuses on everything from the Federal Grant and Cooperative Agreement Act of 1977 ("FGCAA"), Pub. L. No. 95-224, 92 Stat. 3, to the Office of Federal Procurement Policy Act ("OFPPA"), Pub. L. No. 93-400, 88 Stat. 796, to the Federal Acquisition Regulation ("FAR"), to an offhand remark by a member of Congress 50 years *before* Congress passed the CDA – all in an attempt to induce this Court to impose two limitations on the CDA's broad scope. According to the NPS, the CDA applies only if (a) the government has expended "government funds" in conjunction with the subject contract and (b) that contract is for an acquisition "by and for the direct use and benefit of the federal government." Resp. Br. 27. The NPS asserts that its concessions contracts meet neither of these requirements.

There are several fundamental problems with the agency's approach. First, and foremost, the NPS ignores the fact that the question before this Court is the correct interpretation of section 3(a) of the CDA, rather than the terms of a hypothetical, paradigmatic "procurement contract." The agency does not, and cannot, claim that its limitations have any textual basis within the CDA itself. The statutory language controls, however, and it is irrelevant how closely NPS concessions contracts resemble the "typical" (Resp. Br. 26) form of a "procurement contract," if such a thing even exists. But beyond that, on closer examination the agency's arguments in support of these limitations fall apart. The NPS offers no explanation for *why* Congress would have wanted to impose either of these limitations on a statute addressing dispute-resolution mechanisms. Finally, the NPS's claim that its concessions contracts do not involve the procurement of services for the government, even if that were a relevant criterion, is

baseless. NPS concessioners play a critical role in assisting the agency to fulfill its statutorily mandated mission. Without concessioners the agency would be obligated to undertake itself the essential services that concessioners now perform.[1]

I. THE NPS'S POSITION IGNORES THE TEXT AND HISTORY OF THE CONTRACT DISPUTES ACT OF 1978.

As discussed in our opening brief (at 18), the CDA is an intentionally broad statute that Congress intended to cover the vast range of procurements across differing parts of the government.[2] Congress excluded only a few, narrow types of procurements from the CDA, such as contracts for the purchase of real property and certain contracts entered into by the Tennessee Valley Authority. This breadth of coverage was necessary to the goals of the CDA, which included standardizing dispute-resolution practices across government contracts, improving administrative settlement processes, authorizing *de novo* review in court and in the boards of contract appeals, and providing successful disputants prejudgment interest. See Pet. Br. 3-4.[3]

Thus, rather than applying only to "procurement contracts," as the NPS asserts, the CDA mandates that *"[u]nless otherwise specifically provided"* within the statute itself, the CDA "applies to *any* express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of title 28) entered into by an executive agency" for the procurement of goods, services, and the construction and repair of real property, as well as for the disposal of goods. 41 U.S.C. § 602(a) (emphasis added).

As this Court has explained, a statute that "begins with 'except as otherwise provided by law' creates a general rule that applies *unless contradicted in some other provision.*" See *United States* v. *Providence Journal Co.*, 485 U.S. 693, 705 n.9 (1988) (emphasis added). The NPS does not claim that its contracts fall within any of the explicit, textual, exceptions to CDA coverage. Nor does it deny that NPS concessions contracts are contracts for services, and in many instances also cover the construction, repair, or maintenance of real property. Rather, underlying the agency's brief is the assumption that the CDA applies only to what it insists are "typical" procurement contracts. But there is no authority for this assumption.

For example, the government devotes only a footnote to the fact that the CDA applies to contracts in which the government *sells* goods. See 41 U.S.C. § 602(a)(4); Resp. Br. 8 n.4. Such contracts, of course, are not "procurement contracts." And even were the agency correct that the generic

---

[1] The NPS's plea for deference (Resp. Br. 12-15) should be rejected. The NPS does not claim to have interpretive authority over the CDA or to be implementing another agency's regulation. See Pet. App. 27a. Unlike *Bragdon* v. *Abbott*, 524 U.S. 624, 642 (1998), there is no consistent interpretation *across* agencies; rather, as discussed in our opening brief (at 25-26), other agencies have found that the CDA *does* apply to concessions contracts. Affording *any* of these individual agency interpretations deference would undermine the CDA's goal of standardizing dispute-resolution practices. See Pet. Br. 11 n.2.

[2] The NPS claims that our reliance on the legislative history of the CDA – which stresses the statute's breadth – is misplaced, because some early versions of the statute were even broader than the enacted version. See Resp. Br. 26-27. But the coverage provision in the version reprinted in the Senate Report on which we relied (see S. REP. NO. 95-1118, at 43-44, 1978 U.S.C.C.A.N. 5235) is identical to the enacted bill. The NPS's own excerpts from the statute's legislative history – two quotes from the floor debate on the bill (see Resp. Br. 26) – both relate to amendments whereby Congress *explicitly* exempted certain TVA contracts from the final statute. Of course, Congress could have explicitly exempted NPS concessions contracts as well.

[3] The NPS argues that these goals are not implicated here (see Resp. Br. 38-40), but it addresses only two of these goals and unduly minimizes them. For example, the NPS stresses that concessioners will have access to court regardless of whether the CDA applies, but it ignores the fact that the CDA mandates *de novo* review by an independent tribunal, that the agency pay prejudgment interest, and that less formal alternative procedures be provided through an agency's Board of Contract Appeals.

terms "procurement contract" and "contract for procurement" have identical meanings (Resp. Br. 17 n.7), the CDA does not use *either* of these terms.[4] There is no one "adjectival prepositional phrase" (*ibid.* (emphasis omitted)) in the CDA; there are four (see 41 U.S.C. § 602(a)(1)-(4)), only three of which address procurement. Furthermore, neither of the two adjectival phrases relevant to this litigation is the generic phrase "for procurement." Rather, each is more specific and nuanced: "for the procurement of services" and "for the procurement of construction, alteration, repair or maintenance of real property."

Instead, the only question for CDA purposes is whether a binding agreement between the NPS and a concessioner is an "express or implied contract * * * entered into by an executive agency for * * * the procurement of services [or] the procurement of construction, alteration, repair or maintenance of real property." As demonstrated in our opening brief, concessions contracts plainly satisfy these criteria. It follows that the question whether Congress may have "distinguished between NPS concession contracts and procurement contracts" for *other* purposes (Resp. Br. 42) is immaterial.[5]

---

[4] That a prepositional phrase can differ in meaning from its adjectival "equivalent" is evident, however. For example, several courts of appeals have rejected the very interpretation of the Sentencing Guidelines that the Seventh Circuit reached in the opinion from which respondents pull their quote about refusing to "tease meaning" from the difference between an adjective and a prepositional phrase. Compare *United States* v. *Poff*, 926 F.2d 588, 591 (7th Cir. 1991) (en banc) with *United States* v. *Chatman*, 986 F.2d 1446 (D.C. Cir. 1993); *United States* v. *Weddle*, 30 F.3d 532 (4th Cir. 1994).

[5] For example, snippets from hearings and statutes predating the CDA (see Resp. Br. 42-43) are irrelevant, given Congress's intent, in the CDA, to "unify the diverse and often inconsistent procedures" that preceded it. See S. REP. NO. 95-1118, at 17; Pet. Br. 16-19. And differences in phraseology between the 1998 Act and assorted procurement statutes gain the agency nothing; more "telling" (Resp. Br. 44) is the fact that numerous other concessions contracts have been held to be subject to the CDA. See Pet. Br. 25-26. Similarly, *none* of the various quotes from congressional hearings on the NPS concessions program (see Resp. Br. 31-32, 47-49), nor the hearings themselves, had anything to do with either the CDA or with dispute resolution generally. Thus, the NPS's attempt (Resp. Br. 46) to rehabilitate an aside in the committee reports about the 1998 Act, even were such post-enactment legislative history probative (but see Xanterra Br. 28-30), is entitled to no weight here. Finally, the fact that in 1992 the NPS stated that it did not view concessions contracts to be "'a type of federal procurement contract'" (Resp. Br. 46-47 (quoting Final Rule, 57 Fed. Reg. 40,496, 40,498 (1992)) is of no significance. Apart from the threshold question whether such vague language implicates the CDA, it could nevertheless not be relied on as an indication of Congress's intent in passing the 1998 Act given that the NPS's view has consistently been rejected by the IBCA and the Comptroller General (Pet. Br. 24, 35).

[6] For example, the agency relies on *Yosemite Park & Curry Co.* v. *United States*, 582 F.2d 552 (Ct. Cl. 1978), to assert that the expenditure of government funds is necessary for CDA coverage. See Resp. Br. 30 n.14. But although *Yosemite Park* did involve such an expenditure, the case did not turn on it; what the case really demonstrates is that the procurement of services – there, shuttle bus service – *for the public* suffices for CDA coverage. See Pet. Br. 31-32.

II. THERE IS NO SUPPORT FOR THE TWO IMPLIED LIMITATIONS ON CDA COVERAGE PROFFERED BY THE NPS.

Unable to deal with the plain language of the CDA, the NPS has sought to create two implied limitations on CDA coverage. But neither limitation has any legitimacy, and indeed in many instances the authority that the agency uses to support one of its limitations directly undermines the other.[6]

A CDA Coverage Is Not Limited To Contracts Involving The Expenditure Of Government Funds.

Nothing about the language or the purpose of the CDA suggests that the statute should be limited to contracts that "obligate payment using government funds" (Resp. Br. 27). As discussed in our opening brief (at 27-29), there is no logical reason to distinguish among contracts in which the government seeks to enter into a commercial arrangement with a private contractor based on the form of consideration pro-

vided by the government – especially when the issue is what dispute resolution mechanisms should be available.

The NPS's defense of this implied limitation suffers from a number of flaws. To begin with, the NPS consistently glosses over the distinction between contracts involving the expenditure of *appropriated funds* and contracts involving the expenditure of *government funds*, primarily referring to statutes or regulations that are expressly limited to contracts involving appropriated funds.[7] But the NPS does not and cannot claim that the CDA is limited to appropriated-funds contracts.[8] Rather, it invents a new category – "government funds" – to which it seeks to limit the CDA. But no other statute has been limited to contracts that "obligate payment using government funds" (Resp. Br. 27), and the agency never even defines that novel phrase.

Furthermore, rather than supporting the NPS's proposition that *all* government "procurement" statutes, including the CDA, are limited to contracts involving appropriated (or other government) funds, the statutes the NPS cites prove exactly the opposite.

For example, there is no definition of "procurement" or "procurement contract" in the ASPA (Resp. Br. 20-21). Rather, Congress explicitly limited the "*applicab[ilty]*" of that statute "to all purchases and contracts for supplies or services made by [the military] * * * to be paid for from appropriated funds." ASPA § 2(a), 62 Stat. 20. This provision shows that Congress knows how to limit a statute to appropriated funds when it chooses to do so. But it did not include such a limitation in the CDA, and "it is a general principle of

[7] See, *e.g.*, Resp. Br. 19 (FAR); Resp. Br. 20-21 (Armed Services Procurement Act of 1947 ("ASPA"), Pub. L. No. 80-413, 62 Stat. 20); Resp. Br. 21 (10 C.F.R. § 851.102 (1948)); Resp. Br. 24 n. 11 (OFPPA).

[8] See, e.g., Resp. Br. 27-28; Br. in Opp. 11 n.4; given the fact that the CDA applies by its terms to sales contracts and to contracts of some non-appropriated funds instrumentalities (41 U.S.C. § 602(a), (a)(4)) such an argument would, in any event, be frivolous.

statutory construction that when one statutory section includes particular language that is omitted in another section of the same Act, it is presumed that Congress acted intentionally and purposely." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 439-440 (2002) (citing *Russello* v. *United States*, 464 U.S. 16, 23 (1983)); see also *Hohn* v. *United States*, 524 U.S. 236, 250 (1998) (applying same rule where statutory language appeared in only one of two different Acts). The Federal Property and Administrative Services Act of 1949 ("FPASA"), Pub. L. No. 81-152, 63 Stat. 372, is equally unhelpful to the NPS's argument; like the ASPA, it contains no discussion of the meaning of the term "procurement" or "procurement contract," and it does not even contain an appropriated-funds limitation.[9]

The OFPPA (Resp. Br. 23-24) undermines the NPS's argument even more directly; its primary provision delineating OFPP's authority echoes the CDA: OFPP was given the power to "prescribe policies, regulations, procedures, and forms" to be "followed by executive agencies * * * in the procurement of (A) property other than real property in be-

[9] The regulations implementing these statutes (Resp. Br. 21) also undermine the NPS's argument. The first (10 C.F.R. § 851.102 (1948)) merely implements the ASPA's *explicit* appropriated-funds limitation. The second (41 C.F.R. § 1-1.208 (1960)), which was part of the Federal Procurement Regulation ("FPR") – the predecessor to the FAR – defines "contract" very broadly; it explains only that contracts *normally* obligate the "seller to furnish personal property or nonpersonal services (including construction) and the buyer to pay therefor," and "*include*[] all types of commitments which obligate the Government to an expenditure of funds" (emphasis added). Neither of those provisions limits the meaning of the term "contract" or "procurement contract" to ones *requiring* the expenditure of "government funds." In fact, the FPR defined "procurement" to mean "the acquisition * * * from non-Federal sources, of personal property and nonpersonal services (including construction) *by such means as purchasing, renting, leasing (including real property), contracting, or bartering*, but not by seizure, condemnation, donation, or requisition" (41 C.F.R. § 1-1.209 (1960) (emphasis added)) – a definition that does not require the expenditure of government funds.

ing; (B) services, including research and development; and (C) construction, alteration, repair, or maintenance of real property." OFPPA § 6(a), 88 Stat. 796. But Congress *separately*, and unlike in the CDA, statutorily limited OFPP's authority to "procurement payable from appropriated funds." *Id.* § 6(c). The obvious implication is that, but for this limitation, OFPP's authority *would* have extended to executive-agency contracts that did not involve appropriated funds; any other reading of the statute would violate a "cardinal principle of statutory construction" by rendering the appropriated-funds restriction surplusage. *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001). Because the CDA does not include such a limiting clause, its scope is not confined to appropriated-funds contracts.[10]

The FGCAA (Resp. Br. 25) contradicts the government's argument as well. Although this statute does not define the

[10] As the NPS acknowledges, the OFPPA required OFPP to study whether to eliminate the appropriated-funds limitation on OFPP's authority. See OFPPA § 6(c); Resp. Br. 24 n.11. That study further undermines the NPS's argument. The report focused on procurement by "Nonappropriated Fund Instrumentalities" ("NAFIs") (see Executive Agency Nonappropriated Fund Procurement Study Group, *Study of Procurement Payable from Nonappropriated Funds* ("*Study*") 3-6 (1976)), which were excluded from OFPP's dominion by the appropriated-funds limitation. (It is undisputed that the NPS is not a NAFI. See *id.* at G-3; Br. in Opp. 11 n.4.) The study included an extensive discussion of concessions contracts (see *Study* at 377-378) and specifically mentioned concessions contracts used by NAFIs in several agencies. See, *e.g.*, *id.* at 231 (NSA NAFI); *id.* at 236 (Defense Supply Agency NAFI); *id.* at 308 (NASA NAFI). As the study explained, certain types of customer services are frequently provided by NAFIs under "customer service contracts," which are either "concession contract[s]" (where the concessioner pays a fee to the NAFI in consideration for the opportunity to provide goods or services) or "support service contract[s]" (where the NAFI pays the contractor a fee or commission to provide the service). *Id.* at 377. No legal distinction was drawn between these two forms of contracts. After receiving the study, Congress amended the OFPPA to *remove* the appropriated-funds limitation on OFPP's authority. See Office of the Federal Procurement Policy Act Amendments of 1979, Pub. L. No. 96-83, § 4, 93 Stat. 649.

term "procurement contract," it lists types of contracts that are "include[d]" within that term – such as "barter" arrangements – that involve the expenditure of neither "appropriated" nor "government" funds. FGCAA § 4 (now codified without substantive amendment at 31 U.S.C. § 6303).[11]

The NPS's remaining authorities are equally unhelpful. The FAR does not purport to define CDA applicability (see 48 C.F.R. pt. 33; cf. Resp. Br. 19) and did not include *any* definition of "procurement" until 2001.[12] And the definition

[11] The agency's claim (at 28-29) that its contracts are not similar to a bartering situation is both irrelevant and incorrect. It is irrelevant, in that the point is that no payment of government funds is required in a barter, and thus no such limitation should be read into the CDA. It is incorrect, because the NPS is misusing one phrase in *Institut Pasteur* v. *United States*, 814 F.2d 624 (Fed. Cir. 1987) – "specific property" – to attempt to distinguish its contracts from a barter arrangement by pursuing a tangent about whether "the government's interest in a license before its issuance is * * * property" (Resp. Br. 29). But *Pasteur* is far removed from this case, involving what the Federal Circuit described as essentially a "donative" transaction. See 814 F.2d at 628. The terms of a concessions contract – unlike a strain of a virus that might cause AIDS – are clearly susceptible to valuation. In fact, if it were otherwise, bidding on such a contract would be difficult at best. (*G.E. Boggs & Assocs., Inc.* v. *Roskens*, 969 F.2d 1023 (Fed. Cir. 1992), is off point for a similar reason; it did not involve a *commercial* arrangement between the government and a private party.) And the claim that concessioners obtain only a license (Resp. Br. 29 (citing *Cleveland* v. *United States*, 531 U.S. 12, 22 (2000))) is belied by the fact that concessions contracts are *contracts* – not merely permits or licenses to do business – under which concessioners perform specific services in the specific fashion required by the NPS. See Xanterra Br. 20-23. In fact, although under the National Park Service Organic Act, 39 Stat. 535 (codified at 16 U.S.C. §§ 1-4) and the 1965 Act the NPS was authorized to grant "privileges" and "permits" as well as contracts for visitor services (see 16 U.S.C. § 3), under the 1998 Act only "contracts" are now allowed. See *id.* § 5952.

[12] See Final Rule, 66 Fed. Reg. 2117, 2125 (Jan. 10, 2001) (adding definition, but only by cross-reference to "acquisition"). The term "acquisition" for FAR purposes has historically been limited to contracts involving appropriated funds (48 C.F.R. § 2.101), but is a term of art; it does not purport to be a general definition of "acquisition" for all government-contracting purposes.

of "acquisition" in RALPH C. NASH, JR. *ET AL.*, THE GOVERNMENT CONTRACTS REFERENCE BOOK 6 (2d ed. 1998) ("*Nash*"), which the NPS twice quotes (at Resp. Br. 11, 18), is explicitly derived from FAR § 2.101. See *Nash*, at 6.[13] But, as the preface to *Nash* explains, "[g]overnment contracting is complex, and *the rules cannot be gleaned from a single source such as the Federal Acquisition Regulation.*" *Id.* at vii (emphasis added).[14] Finally, 41 U.S.C. § 423(f)(4), which defines "Federal agency procurement" to be limited to appropriated-funds contracts (see Resp. Br. 18) was added in 1996 – 18 years after passage of the CDA – and in any event purports only to define that phrase for purposes of the section of the OFPPA that prohibits federal employees from disclosing nonpublic information about bids and proposals before the award of certain contracts. See 41 U.S.C. § 423(f)(4).

Having struck out in this hodgepodge of other statutes, the NPS reluctantly turns to the CDA itself to seek support for its newly-minted "government funds" limitation. See Resp. Br. 19, 25-27. But the only provision of the CDA that the agency grasps to rely upon – providing that agencies must reimburse the Judgment Fund for any damages award – does not help it. Although the cited section mentions *appropriated* funds, it was for a completely different purpose than suggested by the agency and, in any event, the NPS does not claim that the

[13] The implication in the NPS's brief (at 11) that *Nash* discusses the meaning of "procurement" *within the CDA* is misleading at best; the quote is merely *Nash*'s general definition of "acquisition."

[14] In fact, although *Nash* states that "acquisition" is synonymous with "procurement," it also includes several distinct definitions of "procurement" and "procurement contract" that undermine the NPS's argument here. According to *Nash*, procurement "means the acquisition * * * of personal property and nonpersonal services (including construction) from non-federal sources by such means as purchasing, renting, leasing * * *, contracting, bartering, and condemnation, donation, and requisition (but not by seizure)." *Id.* at 408 (emphases omitted). And a "procurement contract" is any "contract between the Government and a private party to provide supplies or services (including construction)." *Id.* at 409.

CDA is limited to such contracts. What the provision in fact says is that, when the government pays a claim under the CDA from the Fund, the Fund must be reimbursed "by the agency whose appropriations were used for the contract out of available funds *or by obtaining additional appropriations for such purposes.*" 41 U.S.C. § 612(c) (emphasis added). Therefore, this provision does not imply that the contract itself must involve appropriated funds – an impossibility in the context of CDA sales contracts, CDA contracts with NAFIs, or CDA contracts involving a barter. Rather, the purpose of this provision is "to assure that the total economic cost of procurements is charged to [the relevant] programs." See S. REP. NO. 95-1118, at 33. In other words, this provision simply uses a shorthand to clarify that the defendant agency is ultimately responsible for any successful claim.

Finally, noticeably absent from the NPS's brief is any explanation for *why*, for CDA purposes, it should matter whether "government funds" are expended. The NPS concessions program involves contracts generating over $800 million of revenue each year. See NPS Lodging, at 6. There is no reason Congress should have wanted to deny concessioners the CDA's protections when disputes over these government contracts arise. Unlike the situation in most of the cases cited by the NPS – where the government was merely giving funding support to a contract entered into between two nongovernmental parties – a concessioner's sole recourse for the breach of a concessions contract is to the NPS, its contracting partner.

B. CDA Coverage Does Not Depend On Who May Be Said To "Benefit" From A Government Contract.

The NPS's argument that the CDA is implicitly limited to contracts for goods and services "by and for the direct use and benefit of the federal government" (Resp. Br. 27) is similarly supported only by moonbeams. Although NPS concessions contracts in fact satisfy such a test (see Part III, *infra*), the law does not require that they do so.

The agency again relies on other statutes and regulations that were *expressly* limited to procurements "for the use of" the federal government and asks this Court to *impute* the same limitation into the CDA. But the presence of that phrase in one location and its absence in another must have some legislative significance. See *Barnhart*, 534 U.S. at 439-440; *Hohn*, 524 U.S. at 250.[15] And again, several of these statutes and regulations do not include this limitation. See, *e.g.*, 41 U.S.C. § 423(f)(4); 10 C.F.R. § 851.102 (1948); 41 C.F.R. § 1-1.208 (1960). Furthermore, each of the statutes that the government cites for this limitation uses differing phraseology,[16] yet the NPS seeks to extract a common meaning from them. And the agency offers no serious explanation for what would lead a contract to be "for the direct use and benefit of the federal government" (cf. Pet. Br. 32) nor why Congress would *want* to exempt government contracts from the CDA based on this criterion. Instead, it stresses only what it wants that phrase not to include – NPS concessions contracts.[17]

---

[15] Thus, the government's reliance on the ASPA (Resp. Br. 21), FPASA (Resp. Br. 22), and FAR (Resp. Br. 19), which are limited to such contracts – and on *Nash*, which merely parrots the FAR – is misplaced.

[16] Compare ASPA ("for the use of" agency) (Resp. Br. 21); Pub. L. No. 91-129, § 1, 83 Stat. 269 ("by and for the executive branch") (Resp. Br. 22); FGCAA ("for the direct benefit or use of the Federal government") (Resp. Br. 25). It seems that the purpose of the earliest such phrase – in the ASPA – was merely to clarify that the act applied to "one agency purchasing, or making contracts for, the use of other agencies" (S. REP. NO. 80-571, 1947 U.S.C.C.A.N. 1048, 1053), rather than to limit coverage based on who may be said to "benefit" from a procurement. The NPS also mysteriously changes the disjunctive test in the FGCAA ("direct benefit *or* use") to a conjunctive test ("direct use *and* benefit") (Resp. Br. 27).

[17] The NPS is disingenuous to suggest (at Resp. Br. 30 n.14) that *Yosemite Park* and *Total Medical* do not support our argument. We have never disputed that these cases involved the expenditure of government funds, but that is a distinct issue from whether the contracts at issue were for the "direct benefit" of the federal government. And the line the NPS attempts to draw between *Total Medical* and this case – that the contract in *Total Medical* was to benefit federal employees – has no basis; benefiting federal employees is no more or less a benefit to the government than procuring required services for visitors to a national park. See Part III, *infra*.

Similarly, the ASBCA cases (Resp. Br. 30 n.14; Pet. Br. 25-26) demonstrate that other agencies view concessions contracts to be covered by the CDA. The NPS describes *Hernandez* misleadingly; the Board there explained that "the primary function" of a contract with a "bagger" at a commissary "was to obtain services * * * *for all of [the agency's] customers*, which was a direct benefit to the Government." See ASBCA No. 53,011, 01-1 BCA ¶ 31,220, 2000 WL 1844742, at *8-9 (Dec. 12, 2000). This is indistinguishable from a NPS concessions contract.

The only support for the NPS's "direct-benefit" limitation that warrants any significant rebuttal is the FGCAA, which, as the NPS explains, instructs agencies to use procurement contracts "whenever the principal purpose of the instrument is to acquire, by purchase, lease, or barter, of property or services *for the direct benefit or use of the Federal Government*." FGCAA § 4 (emphasis added) (now codified without substantive amendment at 31 U.S.C. § 6303); Resp. Br. 25. Contrary to the NPS's assertion, this provision suggests that the CDA is *not* limited to such contracts. Again, the CDA does not use the term "procurement contract." See page 4, *supra*. Furthermore, the FGCAA demonstrates that Congress *could* have limited the CDA to contracts "for the direct benefit or use" of the government *had it chosen to do so*; by not repeating the FGCAA's language in the CDA, Congress certainly was not inviting the courts to import the omitted phrase. See, *e.g.*, *Barnhart*, *Hohn*, *supra*.

In any event, the NPS has quoted the FGCAA's reference to procurement contracts selectively and has ignored that statute's purpose. The FGCAA was intended to "rational[ize]" the "Federal assistance system." S. REP. NO. 95-449, at 6, 1978 U.S.C.C.A.N. 11, 16; see also 3 COMMISSION REPORT at 153-157. It instructs federal agencies when to employ "grant agreements" or "cooperative agreements" instead of "procurement contracts." See S. REP. NO. 95-449, at 2, 8; *Forsham* v. *Harris*, 445 U.S. 169, 180 (1980). Under the FGCAA, grant agreements and cooperative agreements are to be used when "the principal purpose of the relationship is the

transfer of money, property, services, or anything of value to the [recipient] in order to accomplish a public purpose of support or stimulation authorized by Federal statute." FGCAA §§ 5(1), 6(1) (codified at 31 U.S.C. §§ 6304, 6305). Paradigmatic examples of such grants are federal highway funds and agricultural price supports. See 3 COMMISSION REPORT 155, 175.[18] By contrast, procurement contracts are to be used "(1) whenever the principal purpose of the instrument is to acquire, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; *or (2) whenever an executive agency determines in a specific instance that the use of a type of procurement contract is appropriate*." FGCAA § 4 (emphasis added) (now codified without substantive amendment at 31 U.S.C. § 6303).

Thus, the FGCAA does not limit government agencies' use of "procurement contracts" to instances where there is a "direct benefit" to the government; that is only one instance where they can use such contracts. Furthermore, as OMB explained in its regulations implementing the Act, the FGCAA "does not cover all possible relationships that may exist between Federal agencies and others. For example, the sale, lease, license, and other authorizations to use Federal Property, when not for the purpose of support or stimulation, are not within the scope and intent of [the FGCAA]." Implementation of Federal Grant and Cooperative Agreement Act of 1977 (Pub. L. 95-224); Final OMB Guidance, 43 Fed. Reg. 36,860, 36,862 (Aug. 18, 1978). Even the NPS does not claim that its concessions contracts are grants or cooperative agreements.[19] Whether NPS concessions contracts are "procurement contracts" under the FGCAA, or simply do not fall within its trichotomy at all,[20] is not relevant to this litigation; the coverage of the CDA does not turn on classification under the FGCAA.[21]

[18] The difference between a "grant agreement" and a "cooperative agreement" under the FGCAA is whether there is "substantial involvement" by the executive agency in the "performance of the contemplated activity." FGCAA §§ 5(2), 6(2) (codified at 31 U.S.C. §§ 6304, 6305).

[19] As the agency acknowledges, it has long "disavowed any interest in 'assisting' the concessioner under the FGCAA." Resp. Br. 37 (quoting *R & R Enters.*, IBCA No. 2417, 1989 WL 27790, at *24 (Mar. 24, 1989).

Finally, the NPS (at 35 n.18) misses the point of our discussion of the Long Term Care Act, which demonstrates that a direct benefit to the government is unnecessary for CDA coverage. Congress did not "indicat[e] doubt that the CDA would have applied of its own terms" to contracts under the Act (Resp. Br. 35 n.18); quite the contrary, Congress *presumed* that the CDA would apply and statutorily tweaked the CDA's judicial review provisions. See Pet. Br. 30.

In sum, the NPS's attempt to introduce a "direct use and benefit" test into the CDA has no basis. Even if the NPS could show that its concessions contracts procured a benefit *only* for the general public, the CDA would still apply. But in fact, as we discuss below, NPS concessions contracts also procure a direct and substantial benefit for the agency.

III. NPS CONCESSIONS CONTRACTS PROCURE A DIRECT BENEFIT FOR THE GOVERNMENT.

We demonstrated in our opening brief (at 33-35) that the

[20] Cf. Dep't of Interior, 505 Departmental Manual 2.3(B) (exempting concessions contracts from regulation to determine into which of the FGCAA's three categories a given contract falls) (available at http://-elips.doi.gov/elips/release/3080.htm).

[21] Case law demonstrates that a contract's classification under the FGCAA is irrelevant to the applicability of various other federal procurement statutes, including the CDA. See, *e.g.*, *Trauma Serv. Group* v. *United States*, 104 F.3d 1321, 1326 (Fed. Cir. 1997) (disagreeing with Court of Federal Claims' conclusion that a "Memorandum of Agreement" between CHAMPUS and a medical provider, as a cooperative agreement, could not be a contract for purposes of Tucker Act jurisdiction); *Total Med. Mgmt., Inc.* v. *United States*, 104 F.3d 1314, 1320 (Fed. Cir. 1997) (finding CHAMPUS Memorandum of Agreement to be covered by CDA); *Henke* v. *U.S. Dep't of Commerce*, 83 F.3d 1445, 1450-1453 (D.C. Cir. 1996) (holding Privacy Act, which covers "federal contracts," to apply to grant agreements).

NPS directly benefits from its concessions contracts, in that concessioners provide visitor services that the NPS is obligated by statute to offer – services that, but for concessioners, the agency would be forced to provide itself. As this Court has explained, "[t]he Secretary of the Interior is responsible for maintaining our national parks, and for providing facilities and services for their public enjoyment *through concessionaires or otherwise*." *Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186, 187 (1968) (citing 16 U.S.C. §§ 1, 17b, 20 (1964 ed. and Supp. III)) (emphasis added). Thus, even if only contracts "'for the direct benefit or use'" of the NPS were covered by the CDA (Resp. Br. 30 (quoting FGCAA § 4)), NPS concessions contracts would easily qualify.

To avoid this result, the agency ignores the text of its own controlling statutes. Although the NPS acknowledges that the Organic Act mandates that it "provide for the enjoyment" of the national parks (16 U.S.C. § 1), it never references the critical language in the 1998 Act – which is substantively identical to the 1965 Act before it – that the agency *must* provide "accommodations, facilities, and services * * * that are necessary and appropriate for public use and enjoyment" of the national parks (16 U.S.C. § 5951(b)(1)) and that it is *required* to "utilize concessions contracts" when hiring private parties to provide these services (*id.* § 5952). Thus, the NPS simply wishes away the sections of its controlling statutes that prove that the agency can enter into a concessions contract only if that contract serves the agency's mission. Nor does the NPS address the other agency materials that we cited (Pet. Br. 34-35), which demonstrate that the agency is receiving a direct benefit under its concessions contracts.

1. The NPS (at 34-36) cites a few cases to prop up its novel assertion that assisting an agency in fulfilling its mission is not a "direct benefit or use" to that agency for purposes of the CDA. But these cases prove nothing of the kind. For example, *Delta Steamship Lines, Inc.* v. *United States*, 3

Cl. Ct. 559 (1983), is easily distinguishable; as the Claims Court explained, the contract there was for "the payment of a subsidy for construction of a vessel purchased by a private party *for its own use*," not for the public's or the government's use (*id.* at 569) (emphasis added).

Blanco-Mora Enterprises, Inc., HUDBCA No. 94-G-136-C5, 94-3 BCA ¶ 26,974, 1994 WL 248163 (June 10, 1994), is similarly off point; its conclusion that the CDA does not apply to contracts that are "basically grant or sociological type contracts designed to accomplish Government social policy goals" (*id.* at *4) means at most that grants and cooperative agreements are not covered by the CDA – but that is irrelevant here. See note 19, *supra*. Nothing in *Blanco-Mora* suggests that binding contracts that assist an agency in accomplishing its statutorily mandated mission, such as NPS concessions contracts, are excluded from the CDA.

Finally, the contract at issue in *New Era Construction* v. *United States*, 890 F.2d 1152 (Fed. Cir. 1989), was not covered by the CDA for the straightforward reason that the United States was not a party to that contract. See *id.* at 1154. Rather, the contractor entered into (and sought CDA protection under) a construction contract with the independent housing authority of an Indian tribe, which in turn had a *separate* financing contract with the Department of Housing and Urban Development. See *ibid.* Nothing in *New Era* addresses what is a "direct benefit" to the government. In any event, any implicit limitation the NPS seeks to extract from *New Era* was later rejected by the Federal Circuit itself, which, in *Total Medical*, 104 F.3d at 1320, held that contracts under which a contractor assists the government in fulfilling a legal obligation *are* covered by the CDA.[22]

---

[22] The authorities that the NPS relegates to a footnote (Resp. Br. 36 n.19) in support of this proposition warrant no more than a footnote in return. *Janowsky* v. *United States*, No. 92-5004, 1993 WL 36863, at *2-3 (Fed. Cir. Feb. 17, 1993), is both irrelevant – there was no claim that the contract was for a statutorily-mandated task – and misleading – *the gov-*

2. Given its statutory mission, the NPS must (and does) procure a "direct benefit" under *all* of its concessions contracts.[23] The details of specific concessions contracts, and in particular differences between "Category I" and Category II or III contracts (Resp. Br. 6 n.3, 33-34), are beside the point.[24] For example, the "Category III" contract included in the NPS's Lodging (at 11-50) explains that this contract was entered into "to provide for the public enjoyment of" the park (Lodging 14 (paraphrasing 16 U.S.C. § 5951(a))) and that the visitor services authorized under that contract "are necessary and appropriate for the public use and enjoyment" of that park (*ibid.* (paraphrasing 16 U.S.C. § 5951(b))).

That no services were *required* under this contract (Lodging 16) is also irrelevant; the "[s]port hunting guide services" (*ibid.*) "authorized" by that contract are, *according to the agency itself*, necessary for the public's use and enjoyment of the Denali National Preserve. Presumably, the contract did not require this particular contractor to offer such services during any specific period because others also offer similar visitor services in the area under their own concessions contracts, or because these contractors could be replaced easily.[25]

---

ernment there argued for CDA coverage. And *Winstar Corp.* v. *United States*, 21 Cl. Ct. 112, 117 (1990), contains nothing more than a conclusory statement about CDA coverage.

[23] The NPS states at one point that "services 'for the direct *benefit or* use' of the National Park Service" (Resp. Br. 30 (quoting 31 U.S.C. § 6303) (emphasis added)) would suffice for CDA coverage, but then concludes that "the government receives [no] 'direct ... use'" of such services (Resp. Br. 31 (quoting 31 U.S.C. § 6303) (omission in original)). Even if this were true, however, nowhere does the agency explain why services for the "direct benefit" of the agency should not also suffice even under its interpretation of the CDA. Nor does it explain its intermittent insistence that only services for the "direct use *and* benefit" (Resp. Br. 27 (emphasis added)) of the agency would qualify. See note 16, *supra*.

[24] The two "Permits" included in the NPS's Lodging (at 51-60 and 61-91) were issued before the 1998 Act was operative; under the 1998 Act no new concessions permits will be granted. See note 11, *supra*.

[25] The NPS's website lists two businesses offering sport hunting trips in Denali, as well as six mountain guides, three hiking guides, and numerous dog-sled and air-taxi services. See http://www.nps.gov/dena/home/-visitorinfo/concessions/concessionslist.html. The NPS also benefits under this contract because the concessioner is required to pay the NPS a fee *regardless* of whether it in fact provides visitor services in any given period. See Lodging 21.

In such an instance the NPS may not care *who* among its contractors provides required services, but the services themselves are necessary to the agency's mission, and thus are for the "direct benefit" of the NPS.

The point here is that before the NPS can even *issue* a concessions contract, it must find that the concessioner under that contract will provide services necessary to the agency's mission. Thus, *even if* a direct benefit to the government is required for CDA coverage, as the NPS asserts, this finding suffices. *YRT Services Corp.* v. *United States*, 28 Fed. Cl. 366 (1993), is not persuasive authority to the contrary. Cf. Resp. Br. 30. Beyond having nothing to do with the CDA (see Pet. 13), and mistakenly calling a concessions contract a permit (28 Fed. Cl. at 392 n.23), *YRT* focuses on the significance of the payment of government funds, rather than on who "benefits" under such a contract (see *ibid.*).

3. The NPS's argument (Resp. Br. 32-33) that the CDA does not encompass contracts involving the construction or maintenance of facilities *owned by the government* – which most or all Category I or II contracts entail (see Resp. Br. 6 n.3) – is frivolous. Because these contracts so plainly involve a benefit for the government itself, the NPS is forced to contend that they do not fall within the CDA because that is not their "primary" (Resp. Br. 32) or "principal" (Resp. Br. 33) purpose. Cf. Resp. Br. 11, 17-19, 21-24, 29. But the agency provides no rationale for this even more bizarre implied limitation on CDA coverage; its one Georgia Court of Appeals decision has nothing to do with the CDA, and it is well established that a traditional lease *is* covered by the

CDA. See Pet. Br. 15 n.6.[26]

4. Finally, the agency's contention (Resp. Br. 37) that it has no obligation to accommodate visitors in the national parks – and thus that concessioners do not assist it in fulfilling its statutory mission – is quite remarkable. If the NPS did not use concessioners to provide visitor services in the national parks, it would have to provide these services itself. The NPS must "provide for the enjoyment of" the national parks (16 U.S.C. § 1), and may enter into concessions contracts only if it finds them to be "*necessary* and appropriate" (16 U.S.C. § 5951(b)(1) (emphasis added)) for this task. See page 16, *supra*. Just because, for obvious reasons, the NPS does not feel the need to employ concessioners to provide visitor services in many of the smaller units under its jurisdiction (Resp. Br. 37), the agency cannot plausibly claim that it could ignore its controlling statutes and provide no visitor services in Yellowstone, Yosemite, Acadia and the dozens of other major parks that cater to millions of visitors each year.

Thus, even if a service must "direct[ly] benefit" the government for it to fall within the CDA, NPS concessions contracts plainly satisfy this criterion.

CONCLUSION

The judgment of the court of appeals should be reversed.

---

[26] The NPS's assertion that the claim in this case involves only a facial challenge (Resp. Br. 33) – an argument the agency never made below – gains it nothing. Under the NPS's own "Standard Concessions Contract," 65 Fed. Reg. 26,052 (May 4, 2000) and "Simplified Concession Contracts," 65 Fed. Reg. 44,894 (July 19, 2000), NPS concessions contracts will *necessarily* be covered by the CDA. Therefore, the NPS regulation purporting to exempt all of its contracts from the CDA is arbitrary or capricious. Even if the Court were to find that, based on these standard contracts, only some subset of NPS concessions contracts are covered by the CDA, the regulation categorically exempting *all* such contracts would still be contrary to law and thus facially invalid. Unlike *United States* v. *Salerno*, 481 U.S. 739, 745 (1987), there are no factual questions to analyze here.

Respectfully submitted.

KENNETH S. GELLER
Counsel of Record
RICHARD B. KATSKEE
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

FEBRUARY 2003